

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-001132-MR

DAN R. JACOBE AND  
SHARON K. JACOBE

APPELLANT

v. APPEAL FROM TAYLOR CIRCUIT COURT  
HONORABLE DOUGHLAS M. GEORGE, JUDGE  
ACTION NO. 03-CI-00166

GREEN TREE FINANCIAL SERVICES LLC  
F/K/A CONSECO FINANCE SERVICING CORP.

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; DYCHE AND HENRY, JUDGES.

COMBS, CHIEF JUDGE: Dan and Sharon Jacobs appeal a summary judgment and order of sale entered on February 11, 2004, by the Taylor Circuit Court in favor of Green Tree Financial Services, LLC. After our review of the record and the arguments of the parties, we affirm.

In February 2000, the Jacobses entered into a written agreement to purchase a 1989-model mobile home and the real property upon which it was located from Conseco Finance

Servicing Corp. Conseco financed the purchase and retained a security interest in the mobile home. The promissory note was also secured by a lien on the real property. The loan agreement provided for monthly installment payments and allowed for acceleration of the debt in the event of a default.

In November 2000, Green Tree, Conseco's successor in interest, filed a mortgage foreclosure action against the Jacobes in Taylor Circuit Court. Green Tree claimed that the Jacobes had defaulted on the agreement by failing to make their scheduled payments. Invoking the note's acceleration clause, Green Tree sought enforcement of the security agreement and the mortgage lien. The Jacobes filed a counterclaim, alleging that title to the real property was defective.

The matter was eventually referred to arbitration, and in March 2002, the Jacobes agreed to dismiss their counterclaim in exchange for Green Tree's dismissal of the foreclosure action. Green Tree also reduced the Jacobes' interest rate from 13.25% to 8% and forgave late fees that had accrued pending the resolution of the dispute.

In February 2003, the Jacobes advised Green Tree that it intended to cease its monthly installment payments because of issues that had remained unresolved following arbitration -- namely, the total amount of their outstanding balance. The Jacobes did not tender the payment due in February 2003 or any

additional installments to Green Tree. On May 19, 2003, Green Tree again filed a mortgage foreclosure action against the Jacobes. The Jacobes re-asserted their initial counterclaim.

In November 2003, Green Tree filed a motion for summary judgment based on the Jacobes' default on the note. After extensive briefing, the Taylor Circuit Court entered judgment and an order of sale in Green Tree's favor. The court concluded that "[i]ssues regarding the [Jacobes'] entitlement to a set off against the amount owed to [Green Tree], or [Green Tree's] entitlement to a deficiency balance are reserved for later adjudication." The judgment was properly designated as a final and appealable order, and it recited that there was no just cause for delay.

On February 17, 2004, the Jacobes filed a motion to vacate the summary judgment, arguing that it had been erroneously entered since they were not in breach of the agreement **as amended** following arbitration. They contended that they were justified in their refusal to pay under the monthly installment contract since Green Tree had failed to abide by its agreement to forgive nearly \$8,000.00 in accumulated interest. The motion was set for hearing on March 30, 2004.

On March 4, 2004, the master commissioner filed his notice of sale and set the date of the sale for March 26. On March 8, the Jacobes filed an objection to the commissioner's

proposed sale date. Although the motion was set for a hearing on March 16, the record reveals no indication of its resolution. The Jacobes did not otherwise attempt to enjoin the sale.

The property was sold on March 26, 2004, and the master commissioner duly filed his report of sale. Green Tree was the successful bidder for the property at the sale. The Jacobes did not file exceptions to the sale, but on April 5, 2004, the circuit court ordered the master commissioner not to prepare a deed until after the motion to vacate the summary judgment had been resolved.

On May 11, 2004, the circuit court denied the Jacobes' motion to vacate the summary judgment. An order confirming the master commissioner's report of sale was entered on May 18, 2004, with the circuit court expressly retaining jurisdiction for the purpose of determining a proper distribution of the sale proceeds. The Jacobes filed their notice of appeal on June 8.

On September 7, 2004, the parties participated in a prehearing conference conducted by the staff of this Court. Following the conference, the Jacobes filed a motion in the circuit court requesting the court to determine whether a deficiency judgment would be awarded against them or if Green Tree would be required to return any sale proceeds that exceeded their outstanding balance. Because of the procedural posture of

the case, the circuit court did not respond to the Jacobes' motion.

On May 9, 2005, this Court entered an order noting that no disposition of the appeal had been made following the prehearing conference. The appeal was ordered to proceed, and a briefing schedule was entered.

On May 19, 2005, Green Tree filed a motion to dismiss the appeal. Green Tree argued that the circuit court's summary judgment and order of sale were not final and appealable orders. Green Tree emphasized the court's retention of jurisdiction to determine a proper distribution of the sale proceeds and requested that the matter be remanded to the trial court for a complete adjudication of the issues remaining between the parties. We denied the motion in an order entered July 26, 2005.

In Kentucky, an order of sale is a final, appealable order. See Security Federal Savings & Loan Ass'n. of Mayfield v. Nesler, 697 S.W.2d 136 (Ky. 1985). Although issues related to a proper distribution of the sale proceeds remain unresolved, the Jacobes are entitled to pursue an appeal of the entry of judgment against them and the order of sale.

As noted, the circuit court entered summary judgment in favor of Green Tree. Summary judgment is proper where there are no material issues of fact and the movant is entitled to

judgment as a matter of law. Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476 (Ky. 1991). Summary judgment was properly granted in this case.

The Jacobes did not tender their payment scheduled for February 2003 -- nor any additional installments to Green Tree. However, they contend that they were not in default of their obligation under the agreement and that the trial court erred by permitting foreclosure. The Jacobes argue that they were justified in suspending the scheduled monthly payments because Green Tree had erroneously calculated their outstanding balance following the arbitration proceedings.<sup>1</sup>

We agree that there are circumstances under which a party is excused from performance of a contract when it is breached by the other party. However, this case does not involve such a circumstance. The parties agreed that Green Tree (or, more precisely, its predecessor) would finance the mobile home and real estate purchase in exchange for the Jacobes' promise to repay the loan. The note provided for monthly installment payments and permitted acceleration of the debt in the event that the Jacobes defaulted on their obligation. At the time that Green Tree filed the second foreclosure action, it

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<sup>1</sup>According to the Jacobes, Green Tree had agreed at arbitration to waive the interest that had accumulated on the debt during the time that the parties were negotiating to resolve the 2000 foreclosure action. Green Tree strenuously disagreed and never adjusted the outstanding balance to the satisfaction of the Jacobes.

had fully performed its obligation under the agreement by loaning the proceeds used to fund the Jacobes' purchase. The Jacobes' belief that Green Tree had miscalculated their outstanding balance did not relieve them then of their underlying obligation to repay the loan according to the scheduled monthly installments. When the Jacobes became convinced that Green Tree had erred in its computation of their outstanding balance, the proper course of action would have been to challenge the calculations while continuing to make the payments due under the loan agreement. Their obligations under the note would not have been discharged even if they had been correct that Green Tree had been mistaken in its computations.<sup>2</sup>

The Jacobes were not excused from performance of making payments, and they defaulted on that obligation. Green Tree was entitled to judgment and an order of sale as a matter of law. Therefore, the judgment and order of sale of the Taylor Circuit Court are affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR  
APPELLANTS:

Jonathan R. Spalding  
Lebanon, Kentucky

BRIEF FOR APPELLEE:

Douglas C. Howard  
Frankfort, Kentucky

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<sup>2</sup>The Jacobes have presented no argument on appeal regarding the alleged defect in title to the real estate that was asserted in their counterclaim.

ORAL ARGUMENT FOR APPELLEE:

Christopher M. Hill  
Frankfort, Kentucky